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IN THE

Supreme Court of the United States

October Term, 1940.

No. 674

JOSEPH SCIORTINO,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

LEO H. KLUGHERZ,
Counsel for Petitioner.

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UNITED STATES OF AMERICA,
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No.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Chief Justice and Associate Justices of the United States Supreme Court:

JOSEPH SCIORTINO, the petitioner above named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of conviction and sentence imposed upon the petitioner in a criminal cause in the United States District Court for the District of Connecticut. The Judgment of the Circuit Court of Appeals was filed on November 12th, 1940.

Question Presented.

Was the evidence against petitioner sufficient to make out a *prima facie* case?

Statute Involved.

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Title 18, Sec. 88, United States Code, Annotated.

Statement.

Petitioner was indicted in the United States District Court for the District of Connecticut with ten others charged with conspiracy to carry on business of distillers without giving bond, etc., in violation of Section 88, Title 18, United States Code, Annotated. Pleas of guilty were interposed by six, one was not apprehended, three were tried and convicted, among them petitioner and one was acquitted.

The Government proved an unregistered still was seized at Norwalk, Conn., on October 25th, 1939 (R. 80). A second still was seized at Stamford, November 28th, 1939 (R. 267). The indictment charged one conspiracy. The Government relied entirely upon circumstantial evidence as to petitioner. There was no testimony whatever against him connecting him directly with either still or with a conspiracy. Petitioner was seen on only one occasion in front of the bakery of defendant Santagate on September 28th (R. 166-167). Santagate conducted a bakery in Norwalk and furnished the supplies for the still. Petitioner was seen on several occasions in conversation with other persons alleged to be conspirators, in White Plains where he lived (R. 599). Certain toll slips showing telephone calls to petitioner's home from August 5th, 1939 to November 24th, were received in evidence (R. 70, 81).

Reason Urged for Allowance of Writ.

An important question of Federal Law is involved as the Circuit Court of Appeals has failed to follow the latest decision of this Court on the sufficiency of evidence of conspiracy.

Where the evidence consists only of a record of telephone calls to the home of an alleged conspirator and of the accused being seen with one or more of the alleged conspirators on several occasions the Court should dismiss the indictment or direct a verdict for defendant.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding it to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case at bar and that the judgment of said United States Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other, further and different relief in the premises as to this Court may seem just.

And your petitioner will ever pray.

JOSEPH SCIORTINO,
Petitioner.

By LEO H. KLUGHERZ,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

JOSEPH SCIORTINO, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

Brief in Support of Petition.

Opinions in the Court Below.

No opinion was rendered by the District Court.

No opinion was rendered by the Circuit Court of Appeals.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered November 12th, 1940 (R. 442). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the act of February 13th, 1925.

Questions Presented, Statement, Etc.

The questions presented, statement of the case, and the specification of errors relied upon are set out in the petition and further facts are stated under the points where necessary.

ARGUMENT.

POINT I.

The Evidence Was Utterly Insufficient.

The mere circumstance of a number of telephone call slips coupled with petitioner's casually being seen on the street or in a restaurant with those who may have been connected with an illicit still is not enough to establish a *prima facie* case of conspiracy.

Merely being seen with a participant in a crime about the time it is committed is not enough.

> *Courtney* v. *People,* 28 Hun 589, aff'd 94 N. Y. 490;
> *People* v. *Josephs,* 143 App. Div. (N. Y.) 522.

In *Falcone* v. *United States,* 109 F. (2nd) 579, the Circuit Court of Appeals (2nd Circuit) said:

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use, he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today, when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.
>
> That there are opportunities of great oppression in such a doctrine is very plain and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided" (p. 581).

The Circuit Court further said in that case:

> "But it could not be inferred from that or from the casual and unexplained meetings of some of

> respondents with others who were convicted as conspirators that respondents knew of the conspiracy" (p. 582).

That case was reviewed in this Court. Certiorari granted 310 U. S. 620.

In affirming a reversal by the Circuit Court of Appeals, this Court in 311 U. S. 179 said:

> "The gist is the agreement among conspirators to commit an offense attended by an act of one or more conspirators to effect the object of the conspiracy. (See 37 Criminal Code, 18 U. S. Code, Sec. 88.) Those having no knowledge of the conspiracy are not conspirators. *United States* v. *Hirsch,* 100 U. S. 33, 34; *Weniger* v. *United States,* 47 F. (2nd) 692, 693."

In *Matter of Case,* 214 N. Y. 199, 203, 204, the Court of Appeals of New York said that

> "Insufficient evidence in the eyes of the law is no evidence."

A mere scintilla of evidence is insufficient.

> *Peo.* v. *Ledwon,* 153 N. Y. 10;
> *Peo.* v. *Gluck,* 188 N. Y. 167.

POINT II.

Affirmance by the lower court is in conflict with a later decision by this court.

The decision of the Circuit Court of Appeals is in conflict with *Falcone* v. *United States,* 311 U. S. 179 decided at this term of Court and therefore merits review.

> *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531.

CONCLUSION.

This petition for a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the Second Circuit as to petitioner Sciortino and finally reverse it.

Respectfully submitted,

Leo H. Klugherz,
Counsel for Petitioner,
Joseph Sciortino.

William I. Cohen,
Max Schultz,
Of Counsel.

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289610—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 674

JOSEPH SCIORTINO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The judgment of the District Court was affirmed by the Circuit Court of Appeals *per curiam,* without opinion (R. 442).

JURISDICTION

The judgment of the Circuit Court of Appeals affirming petitioner's conviction was entered on December 6, 1940 (R. 446), after denial of a petition for rehearing on December 5, 1940 (R. 445–446). The petition for a writ of certiorari was filed Jan-

uary 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was any substantial evidence that petitioner knowingly participated in a conspiracy to violate the internal-revenue laws relating to liquor.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment in one count was returned against eleven defendants, including petitioner, in the District Court for the District of Connecticut. This indictment charged the defendants with conspiring to carry on the business of distillers without having given bond as required by law and with the intent to defraud the Government of the tax on the spirits distilled, by operating two illicit stills, one at Nor-

walk and the other at Stamford, Connecticut. The conspiracy was alleged to have begun about August 1, 1939, and to have terminated about November 29, 1939 (R. 10–14).

A motion for a directed verdict upon the ground of insufficiency of the evidence, made at the close of the entire case (R. 375), was denied and exception taken (R. 2–3, 380). Of the defendants, six pleaded guilty (R. 6), one was apparently a fugitive (R. 223), and four, Joseph Sciortino, Joseph Brancolino, Antonio Santagate, and Antonio Clapes, went to trial (R. 21). Antonio Clapes was acquitted and petitioner and the two other codefendants were found guilty by verdict of the jury (R. 7, 391). Petitioner was sentenced to two years' imprisonment (R. 16). Petitioner and the two convicted codefendants appealed to the Circuit Court of Appeals for the Second Circuit which, without opinion, affirmed *per curiam* the judgments of conviction as to all three (R. 442, 446) and denied the petitioner's application for rehearing (R. 445–446).

Petitioner does not question that there was sufficient evidence to establish the existence of the conspiracy charged, but contends that the evidence was insufficient to warrant the jury in finding that he was a knowing participant in the conspiracy. The evidence with reference to this question may be summarized as follows:

The Norwalk still was set up sometime in August 1939 on the second floor of premises of which de-

fendants Julius and Bernice Tingets, who pleaded guilty (R. 6), were tenants (R. 39–40). When the still was completed does not appear, but there is evidence that beginning on September 30, 1939, the defendant Santagate, who was convicted by the jury (R. 7, 391) and who operated a bakery in Norwalk, began furnishing supplies for the operation of the still (R. 40, 54). The Tingets' part in the operation of the still was to secure from Santagate sugar, yeast, salt, and five-gallon tin cans, to bring them to the still premises from Santagate's bakery and to deliver the alcohol produced (R. 40, 46, 51–53, Govt. Ex. 1, R. 52). The Tingets made no payment for these supplies to Santagate and there were no charge slips made covering the merchandise (R. 41). Mrs. Tingets kept a record of all the materials obtained from Santagate and of the alcohol that was produced at the still (R. 40, 51–52). When Tingets wanted to withdraw from the enterprise Santagate assured him that "everything would be taken care of if anything happened." Tingets testified that Santagate would ask him every night how much alcohol was taken from the still (R. 42). The employment of the Tingets was arranged by the defendant Paul Neri, who pleaded guilty (R. 6), and the Tingets and Neri were on the premises when the still was seized on October 25, 1939 (R. 27).

On September 28, 1939, two days before Santagate began furnishing supplies for the still, the petitioner was observed in conversation with Santagate

at the latter's bakery (R. 56). Santagate admitted talking to Sciortino at his place of business on that occasion (R. 287) and also in August 1939 (R. 286).

Also, toll slips introduced by the Government showed two calls from Santagate's telephone to the home of the petitioner in White Plains, New York, on September 26, one on September 27, and one on September 28 (Govt. Ex. 13, R. 83).

Other toll slips showed calls between the telephone in the home of a Mrs. Mantegna and Santagate's telephone. Mrs. Mantegna lived in Stamford, next door to the defendant Brancolino, one of the defendants convicted by the jury (R. 7, 391), who admitted that he used Mrs. Mantegna's telephone as he had none himself (R. 341).[1] The toll slips showed that two calls were made on September 27 and thirteen in all between September 16 and October 25, the day the Norwalk still was seized, and that none were made between the two telephones before or after those dates (Govt. Ex. 10, R. 78). Santagate admitted knowing Brancolino (R. 291–292).

The toll slips covering Mrs. Mantegna's telephone showed that between August 5 and October 25, the date of the seizure of the Norwalk still, there were twenty-eight telephone calls between that telephone and the telephone of the petitioner in White Plains, New York (Govt. Ex. 10, R. 78). Bran-

[1] Brancolino had twice been previously convicted of violating state and federal liquor laws (R. 337–339).

colino admitted to one of the Government agents that he had called the petitioner quite often on Mrs. Mantegna's telephone (R. 191–192). Mrs. Mantegna stated to Government agents that Brancolino used her telephone repeatedly and, upon being shown a photograph of petitioner, informed the agents that neither she nor anyone in her family knew him and that she had never called him (R. 302–305, 370–371).

Construction of the Stamford still took place about the middle of October 1939 (R. 134–135, 143–146, 147–148, 153–156, 157–159). This still was concealed in the center of a building at the front of which was a gas station and at the rear of which was a space utilized as a garage (R. 90–91). On a receipt for some of the building materials delivered at the still premises on October 16 were the initials "JB" (Govt. Ex. 22, R. 153–155). These initials were in a handwriting similar to that appearing on documents signed by Brancolino (Govt. Ex. 4, R. 65; Ex. 29, R. 340). A W. P. A. foreman testified that Brancolino, who was employed on W. P. A. work, did not report for work on October 16, 1939, which was a regular workday (R. 162).

On November 2, 1939, Alcohol Tax Unit investigators observed Brancolino drive from his home in Stamford to petitioner's home in White Plains, New York. Shortly thereafter petitioner arrived and entered his house. Half an hour later three men, including the defendant Randazzo, who was a fugitive from justice at the time of trial (R.

223), came out of the petitioner's home and drove off (R. 93–94).

On November 15 the agents saw Brancolino contact the defendant Reitano, one of the defendants pleading guilty (R. 6), who had parked his truck near Brancolino's home in Stamford. This truck was later seized at the Stamford still (R. 95). After talking with Reitano for a short while, Brancolino returned to his home and about five minutes later petitioner drove up, parked a short distance in front of Reitano's truck, walked back and talked with Reitano. Petitioner then left Reitano and, after driving his car some distance, turned around and came back to Brancolino's house. Immediately thereafter Brancolino left his house and drove away followed by the truck driven by Reitano and by a car driven by Randazzo. The agents continued to follow Brancolino who, after taking a circuitous route, drove his car to the street on which the still was located and stopped at a house about a half a block away (R. 94–97).

On the following day petitioner was seen in conversation with Brancolino on a street corner in White Plains, New York (R. 97–98).

The agents located the Stamford still on November 21, 1939, and during the ensuing seven days prior to the seizure of the still kept the premises under observation. Reitano was seen to drive his truck in and out of the premises on various occasions (R. 92, 101). On four occasions the truck was followed by the agents and each time it was driven by Reitano

to White Plains. On each of these occasions it was contacted by the petitioner at different places but not at his house (R. 99, 102, 172–173, 200, 203). On one of these occasions the defendant Antonetti, who was later arrested at the still premises with Reitano (R. 92) and who pleaded guilty (R. 6), accompanied Reitano on the drive to White Plains and petitioner, Reitano, and Antonetti were observed in an extended conversation (R. 200–201).

On November 28 the Stamford still was seized. At the time of the seizure Reitano's truck was on the premises and was found to contain quantities of sugar and molasses (R. 89–92, 173, 200).

During the period the Stamford still was in operation there were twenty-five or more telephone calls from Mrs. Mantegna's telephone in Stamford to petitioner's telephone in White Plains (Govt. Ex. 10, R. 78), and during a portion of this period (November 6 to November 16) there were six calls from petitioner's telephone to that of Mrs. Mantegna (Govt. Ex. 27, R. 41).[2]

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[2] The slips for these six calls, as well as for all other calls emanating from the petitioner's telephone during the period July 21 to December 21, 1939, which were the only existing record of such calls (R. 74), were turned over by the telephone company to the petitioner upon his receipt for them on the morning preceding the trial (R. 69–72). The Government agents had, however, previously inspected these slips and made copies (R. 71). Petitioner did not attempt to secure the slips for any other period, even though they were available to him (R. 71).

In searching Reitano's room the agents found a piece of paper bearing Mrs. Mantegna's telephone number (Govt. Ex. 24, R. 177).

Petitioner by his testimony and that of Mrs. Mantegna attempted to explain away the telephone calls passing between Mrs. Mantegna's telephone and his telephone on the basis of normal communications between friends (R. 297–369). Compare, however, the statements which Mrs. Mantegna had made to Government agents (*supra*, p. 6). Moreover, petitioner admitted in his testimony that he called Brancolino at Mrs. Mantegna's telephone on several occasions and received frequent calls from Brancolino (R. 358).

ARGUMENT

It is not disputed that there was sufficient evidence of the existence of a conspiracy to violate the internal revenue laws relating to liquor, as charged in the indictment, but petitioner apparently contends that the evidence was inadequate to warrant the submission to the jury of the question whether he was a knowing participant in the conspiracy. He refers to the Government's evidence as consisting "only of a record of telephone calls to the home of an alleged conspirator and of the accused being seen with one or more of the alleged conspirators on several occasions" (Pet. 3). On the basis of this appraisal of the evidence peti-

tioner urges that the decision of the court below is in conflict with that of this Court in *United States* v. *Falcone,* decided December 9, 1940 (No. 42, present Term).

While the evidence against the petitioner was circumstantial, it is sufficient, we submit, with the logical deductions and inferences which may be drawn therefrom, to justify the conclusion that the meetings between the petitioner and undoubted conspirators, admitted or proven, were the result of prearrangement pursuant to the conspiracy and not casual or chance encounters, and that the telephone calls to and from the petitioner's home during the period of the conspiracy represented communications between the conspirators for the purpose of carrying out the objects and purposes of the conspiracy. The evasive and inconsistent answers and the repeated assertions of failure to remember, brought out in the cross-examination of the petitioner and his supporting witness, Mrs. Mantegna (R. 302–306, 357–368), added strength to the Government's case. When the evidence is taken as a whole and the pieces put together the jury, we believe, could logically conclude that the petitioner was not only implicated in the conspiracy but was perhaps the dominating influence, operating through various subordinates and workmen and sheltering himself so far as possible by refraining from personally presenting himself at

the premises where the stills were in operation. On a motion for a directed verdict that view of the evidence must be taken which is most favorable to the Government and the jury is entitled to make such deductions and inferences from the proof as may be logical under the circumstances. *Roberts* v. *United States,* 96 F. (2d) 39, 40 (C. C. A. 8th); *Smith* v. *United States,* 62 F. (2d) 1061, 1062 (App. D. C.); *United States* v. *Pandolfi,* 110 F. (2d) 736, 737 (C. C. A. 2d), certiorari denied, 310 U. S. 651.

The District Court, the jury and the Circuit Court of Appeals have united in upholding the sufficiency of the evidence. Under these circumstances, and in the absence of any comprehensive analysis by the petitioner demonstrating the insufficiency of the evidence, we submit that this Court is not required to reexamine the proof. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

The evidence in the *Falcone* case was not analogous. That case involved the sale of legitimate articles of commerce to distillers and there was no evidence possessing any substantiality that the vendors knew that their purchasers were engaged in a conspiracy.

CONCLUSION

The case presents no important question of federal law and there is involved no conflict of decisions. It was correctly decided below. We

therefore respectfully submit that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
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